MONTANA
LEGAL GUIDE TO
LONG TERM CARE PLANNING

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DISCLAIMER

This publication is not intended to be a substitute for legal advice. Rather, it is designed to help families become better acquainted with some of the devices used in financial planning and to create an awareness of the need for such planning. Future changes in laws cannot be predicted and statements in this narrative are based solely on those laws in force on the date of publication.

We recommend that you seek legal advice for all your planning needs.

INTRODUCTION

Montanans face numerous choices. This is especially true in their retirement years. Life can become complicated. However, through proper planning, every person will be able to prepare for these changes in life.

This manual provides a layman's understanding of various legal documents and explanations of their uses. These documents are important components in planning for your future. It is important, however, to seek competent legal advice for your estate planning.

The manual is divided into five sections:

1. POWERS OF ATTORNEY;
2. ESTATE PLANNING;
3. USE OF LIVING TRUSTS;
4. ADVANCED DIRECTIVE -LIVING WILLS; AND
5. GUARDIANSHIP AND CONSERVATORSHIP.

PART 1. POWERS OF ATTORNEY

One of the most cost effective ways to make certain your decisions regarding health, medical treatment, domicile and business affairs are taken care of - is through the use of a power of attorney. This document allows you to identify another person to make day-to-day decisions in the event you are unable to do so.

You are able to decide and control the amount of authority you give to another person. You do not have to involve a court to make a legally binding power of attorney.

There are two different powers of attorney provided in this manual:

1. the Montana statutory Short Form Power of Attorney; and

2. the Durable Power of Attorney for Health Care and Medical Treatment

The first power is primarily a "business" power of attorney. It allows you to delegate authority to another to make financial, banking, real estate and insurance decisions for you. It also allows you to determine whether you want the power to be durable**,** meaning to be enforceable after you have become incompetent.

The second power allows you to delegate decision making authority to another for your health and medical care and treatment. This power of attorney is also very important, especially when you are unable to make decisions for yourself.

Finally, the third document is a revocation of the power of attorney. This document allows you to revoke or “take back" the authority you have given to a person if you later wish to do so.

PART 11. ESTATE PLANNING

We have heard the statement there are two certainties in life: death and taxes. Estate planning allows you to determine how and to whom you will disperse your assets after you have died. You also have the ability to decide who will administer your estate and how the administration will be performed.

This section provides a common checklist of items you should think about when you are engaged in estate planning. This checklist will be helpful when working with your attorney. It provides an overview of your present estate and your intent on how to distribute these assets upon your passing.

The second document is an example of a simple Last Will. You must be careful in drafting a Last Will. We recommend you seek the assistance and consultation of an attorney licensed to practice law in Montana. You can draft and execute a Last Will without an attorney. However, there are certain legal principles that you may not be aware of that may prevent you from achieving the result you wanted.

Remember, it is vital that if you prepare your own Last Will that your will is dated and signed by you. If you have typed your Last Will, you will also be required to have two adults who are not beneficiaries of your estate witness your signing of the Last Will.

Finally, you should make certain that a copy of your Last Will is available to your personal representative (administrator) so that he/she knows what your intent is after you have passed away.

The third document is primarily used while you are alive. It is known as the Montana Homestead Exemption form. Montana law allows you to declare a Homestead Exemption. If the form is completed and recorded in the Clerk and

Recorders' Office in the county in which you live and where you own your home, the form will exempt a portion of your "homestead" from creditors' claims. It does not exempt you from mortgages and construction liens. The homestead is generally considered the home in which you live. It includes your dwelling house or mobile home and the land and improvements legally defined as "appurtenances" to the land. There are limitations on homestead exemptions. The explanation following the Declaration of Homestead will provide you with the additional information.

PART III. USE OF LIVING TRUSTS

In recent times, Montanans have become increasingly interested in establishing a "living trust" for their estate. The living trust is a legal document that is effective while you are alive. It provides a legal means to transfer your assets to a trustee who manages the assets for the beneficiaries designated in the trust agreement. A beneficiary can include yourself. Upon your passing, the trustee can transfer your assets to the named beneficiaries of the trust. This can be done without a formal or informal probate.

The second document is an article prepared by the Dean of the Montana School of Law. He cautions individuals to be careful before they engage in the creation of a revocable living trust. The living trust document can be expensive and may not necessarily save you money in a probate. If the assets are not transferred properly into the trust, it may not achieve what you had desired - the avoidance of probate and additional costs.

We urge you to contact your local licensed attorney if you are seriously considering creating a trust. We caution you not to utilize "financial firms" or "trust organizations" who sell you a trust package. You may want to contact the Montana Attorney General's office, the Montana State Insurance Commissioner or the Office on Aging to get additional information before you pay out any monies to a trust company.

PART IV. ADVANCED DIRECTIVE - LIVING WILL

Montana law allows you to make a "living will." This living will or "declaration" allows a legally competent adult to instruct their physician to withhold or withdraw life-sustaining procedures if they are in a terminal condition and are unable to make medical treatment decisions. You are also able to designate another person to make these end-of-life decisions for you.

You will find an explanation of the Montana Living Will laws (p5l). You will also find a copy of the Montana Rights of the Terminally Ill Act (p56). The act is a copy of state law which provides the legal framework for your rights in this area.

We have also provided a copy of the "Living Will" or "Declaration" form. You may fill out the form and have your signature witnessed by two adults. once you have completed the form, you should make it available to your physician and local hospital so they may place it in your medical records.

As always, you have the ability to revoke the "Declaration" at any time and in any manner. We have provided you a form to revoke your "Living Will" if you should choose to do so.

PART V. GUARDIANSHIP AND CONSERVATORSHIP

It is frightening to think that there could come a day when we are unable to care for ourselves or handle our own finances. However, it is reassuring to know that there are certain legal safeguards in place to protect us if we do become incapacitated. These safeguards include court appointed guardianships and conservatorships.

Montana law defines a guardian as one who is legally empowered and charged with the duty of taking care of another who, because of age, intellect, or health, is incapable of managing his or her own affairs. A conservator is defined as one who is appointed by a district court to manage the affairs of a protected person who, because of age, intellect, or health, is incapable of managing his or her own property.

This section provides a detailed description of the responsibilities, roles, and limitations for guardians and conservators; the rights of the alleged incapacitated person; and the procedure followed by the court when a petition is filed for the appointment of a guardian or conservator.

CONCLUSION

If you should have any questions or desire to discuss these documents or legal issues further, please feel free to contact:

- your local Area Agency on Aging at 1-800-551-3191; or the State Office on Aging at 1-800-332-2272.

If you would like to receive additional information on any topics in this publication, please feel free to also contact your

Local Extension Office -
(Look in the yellow pages under county government)

Family Economics Specialist
Marsha A. Goetting
P.O. Box 172800
Montana State University
Bozeman, MT 59717

POWER OF ATTORNEY

A Power of Attorney is a written document authorizing someone you name (your "agent" or "attorney-in-fact") to make decisions for you in the event you are unable to speak for yourself. These decisions can include financial and business decisions. They may include health and medical care, decisions. This document can also contain instructions or guidelines you want your agent to follow.

You will find two different forms of Power of Attorney in this section:

- a Statutory Short Form Power of Attorney; and
- a Durable Power of Attorney for Health Care and Medical Treatment.

The Statutory Short Form Power of Attorney, was created by the Montana legislature. It will allow you to decide the powers you want to delegate to another person. You will be able to decide when the authorization, to act on your behalf, will begin.

You will also find a Durable Power of Attorney for Health Care and Medical Treatment. if you should ever lose your capacity to make and/or communicate decisions because of a temporary or permanent illness or injury, the Durable Power of Attorney for Health Care allows to you retain some control over important health care decisions by choosing a person to make health care decisions for you.

Without a formally appointed person, many health care providers and institutions will make critical decisions for you, not necessarily based on what you would want. In some situations, a court appointed guardian may become necessary unless you have a health care power of attorney, especially where the health care decision requires that money be spent for your care.

A Durable Power of Attorney for Health Care is different from a Living Will. A Living Will is a written statement of your wishes regarding the use of medical treatments in end of life situations. The statement is to be followed if you are unable to provide instructions at the time the medical decision needs to he made. Living wills are recognized in Montana. However, they are limited to decisions about "life-sustaining procedures" in the event of "terminal illness" and when your life expectancy is a "short period of time."

The Power of Attorney is different. This power applies to all medical decisions, unless you decide to include limitations. This power can include specific instructions to your agent about any treatment you want done or want to avoid.

You need to be careful with the use of the power of attorney. The power you grant to another person is broad and sweeping . The power will become effective immediately unless you state otherwise.

You need to have your signature notarized on your Power of Attorney by a Notary Public. You also need to give the original Power of Attorney to your agent so he/she will have the document when the time comes to make decisions for you. You want to make certain the person who you give the power to is trusted and knows your intent.

You may revoke your power of attorney at any time. You will find a "Revocation of the Power of Attorney" at the end of this section. You must sign and date the revocation. You must make a copy of the revocation and deliver it to the businesses, physicians, banks and hospitals who may be relying upon the power of attorney you originally executed.

STATUTORY SHORT FORM POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THIS PART. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOU. AND YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, _____ of the city of _____ County of _____State of Montana, appoint _____ County of _____, State of Montana, as my agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects:

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT CROSS OUT EACH POWER WITHHELD.

INITIAL

_____ (A) Real property transactions;
_____ (B) Tangible personal property transactions;
_____ (C) Stock and bond transactions;
_____ (D) Commodity and option transactions;
_____ (E) Banking and other financial institution transactions;
_____ (F) Business operating transactions;

_____ (G) Insurance and annuity transactions;
_____ (H) Estate, trust, and other beneficiary transactions;
_____ (I) Claims and litigation;
_____ (J) Personal and family maintenance;
_____ (K) Benefits from Social security, Medicare, Medicaid, or other governmental programs or from military service;
_____ (L) Retirement plan transactions;
_____ (M) Tax matters;
_____ (N) ALL OF THE POWERS LISTED ABOVE. YOU NEED NOT INITIAL ALL OTHER LINES IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS: ON THE FOLLOWING LINES, YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

_____

_____

_____

_____

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

_____ This power of attorney revokes all previous powers of attorney signed by me.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO REVOKE ALL PREVIOUS POWERS OF ATTORNEY SIGNED BY YOU.

IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO REVOKE ALL PREVIOUS POWERS OF ATTORNEY SIGNED BY YOU, YOU SHOULD READ THOSE POWERS OF ATTORNEY AND SATISFY THEIR PROVISIONS CONCERNING REVOCATION. THIRD PARTIES WHO RECEIVED COPIES OF THOSE POWERS OF ATTORNEY SHOULD BE NOTIFIED.

_____ This power of attorney will continue to be effective if I become disabled, incapacitated, or incompetent.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME DISABLED, INCAPACITATED, OR INCOMPETENT.

If it becomes necessary to appoint a conservator of my estate or guardian of my person, I nominate my agent.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT TO NOMINATE YOUR AGENT AS CONSERVATOR OR GUARDIAN.

If any agent named by me dies, becomes incompetent, resigns or refuses to accept the office of agent, I name the following (each to act alone and successively, in the order named) as successor(s) to the agent:

1. _____

2. _____

3. _____

For purposes of this subsection, a person is considered to be incompetent if and while: (1) the person is a minor; (2) the person is an adjudicated incompetent or a disabled person; (3) a conservator has been appointed to act for the person; (4) a guardian has been appointed to act for the person; or (5) the person is unable to give prompt and intelligent consideration to business matters as certified by a licensed physician.

I agree that any third person who receives a copy of this document may act under it. I may revoke this power of attorney by a written document that expressly indicates my intent to revoke. Revocation of the power of attorney is not effective as to a third party until the third party learns of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed this _____ day of _____, _____.

_____
Your Signature

Your Social Security Number: _____ - _____ - _____

State of Montana
County of _____

This document was acknowledged before me on _____.

Name of Principal: _____.

_____
Notary Public for the State of Montana
Residing at: _____
My commission expires: _____

(Notarial Seal)

BY ACCEPTING OR ACTING UNDER THIS APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

_____
Specimen Signature of Agent

DURABLE POWER OF ATTORNEY
FOR HEALTH CARE AND MEDICAL TREATMENT

I , _____ of the City of _____,

State of Montana, do hereby make, constitute, nominate and appoint
_____presently residing in _____,

County, State of Montana, as my true and lawful attorney-in-fact to act for me and in my place and stead for the purpose of making any and all decisions regarding my health and, medical care and treatment at any time that I may be, by reason of physical, mental disability, incompetency or incapacity, incapable of making decisions on my behalf.

1. 1 grant said attorney-in-fact complete and full authority to do and perform all and every act and thing whatsoever requisite, proper and necessary to be done in the exercise of the rights herein granted, as fully for all intents and purposes as I might or could do if personally present and able with full power of substitution or revocation, hereby ratifying and confirming all that said attorney-in-fact shall lawfully do or cause to be done by virtue of this power of attorney and the rights and powers granted herein.

2. If, at any time, I am unable to make or communicate decisions concerning my medical care and treatment, by virtue of physical, mental or emotional disability, incompetency, incapacity, illness or otherwise, my said attorney-in-fact shall have the authority to make all health care decisions and all medical care and treatment decisions for me and on my behalf, including consenting or refusing to consent to any care, treatment, service or procedure to maintain, diagnose or treat my mental or physical condition.

3. In the absence of my ability to give directions regarding my health care, it is my intention that my said attorney-in-fact shall exercise this specific grant of authority and that such exercise shall be honored by my family, physicians, nurses, and any other health care provider(s) or facility in which or by which I may be treated, as a final expression of my legal rights.

4. This power of attorney is durable and will continue to be effective if I become disabled, incapacitated, or incompetent.

5. This durable power of attorney is effective in any state that I may seek or receive medical-treatment and health care.

6. I, specifically direct all health care providers, including physicians, nurses, therapists and medical and hospital staff to follow the directions of my attorney-in-fact and such decisions are superior to and shall take precedence over any decisions made by any member of my family.

7. The rights, powers and authority of said attorney-in-fact herein granted shall commence and be in full force and effect immediately.

8. If any agent named by me dies, becomes incompetent resigns or refuses to accept the office of agent, I name the following persons (each to act alone and successively, in the order named) as successor(s) to the agent:

A. _____

B. _____

9. Special instructions: On the following lines I give special instructions limiting or extending the powers granted to my agent.

_____

_____

_____

10. 1 hereby designate _____ to determine whether I am unable to make or communicate decisions concerning my medical care and treatment by virtue of my physical, mental, or emotional disability, incompetency, incapacity, illness or otherwise. This determination will be provided in writing and attached to this Durable Power of Attorney For Health Care and Medical Treatment.

Dated this _____ day of _____, _____.

Signature of Principal: _____

Social Security Number: _____ - _____ - _____.

State of Montana
County of _____

Subscribed, sworn to and acknowledged before me this _____day
of _____, _____.

(Notarial Seal)

_____
Notary Public For the State of Montana
Residing at _____
My commission expires: _____

REVOCATION OF POWER OF ATTORNEY

I, _____, hereby revoke all powers of attorney granted

to _____ on _____. This is a full revocation and is effective immediately. (Date)

Dated this _____day of _____, _____.

State of Montana
County of _____

Subscribed, acknowledged, and sworn to before me this _____ day of _____, _____.

_____
Notary Public for the State of Montana
Residing at: _____
My commission expires: _____

(Notarial Seal)

ESTATE PLANNING

Who will get your assets when you die? How will these assets be distributed? Do I have any control over how these assets are distributed? What issues and concerns must I think about prior to contacting an attorney in preparation for preparing my will? These are common and important questions that all Montanans have in their estate planning process. This section of the manual is intended to assist you through this process.

You will find two planning guides. These are entitled "Checklist for Estate Planning" and "Estate Planning Data Sheet". They are intended to assist you in estate planning. The checklists are common questions that will be asked by your attorney. They will be very helpful if you have filled these out prior to meeting with your attorney. You will have the benefit of time and consideration in making some of these decisions.

Estate planning is a complicated and a personal process. It should not be delayed. It is also very important that you consult with a licensed attorney. Estate law and Will preparation requires professional training. Your attorney will explain several options available to you in your estate planning.

You will read the term "personal representative." A personal representative is the administrator of your estate. They were previously known as an executor or executrix of the estate. They do not have any power until you have passed away. They will be required to be appointed by the Court into their position.

You will also find a "Sample Will". This is only a sample and should be used as a reference for your estate planning needs. **We do not recommend you draft your own will.**

Will preparation is relatively inexpensive for the typical middle-income Montanan. Feel free to call or visit several attorneys and request information on their fee charges for a will preparation. The general rule of thumb is the more complex your family situation and the more assets you have to distribute when you die, the greater the cost in the preparation of the will.

Montana recognizes holographic wills, which are written documents, prepared in

your own handwriting and signed and dated by you. You have the ability to declare your intent through the use of a holographic will.

Finally, we have provided a copy of the Montana "Declaration of Homestead Exemption. Montana law allows you to protect part of the equity in the home you live in. You must reside in the home. A detailed explanation of the **instructions and recording of a** Homestead Exemption Declaration is found on the reverse side of the declaration form.

CHECKLIST FOR ESTATE PLANNING

FORM ONE

Name: _____

Address: _____

City:_____
_____ State: _____

Home Telephone: _____ Work Telephone: _____

Information Necessary in the Preparation of A Last Will And Testament

1. Full Legal Name
2. Date of Birth
3. Place of Residence, Address, City, State
4. Social Security Number
5. Present Marital Status
6. Previous Marriage(s)

   A. Divorced: Yes ____ No ____

7. Children: Full Legal Names, Date of Birth, Current Residence

_____

_____

_____

_____

_____

Children of Previous Marriage:

_____

_____

_____

Children born out of wedlock:

_____

_____

_____

Adopted Children:

_____

_____

_____

8. Grandchildren: Full Legal Names, Date of Birth, Current Residence

_____

_____

_____

_____

Spouse: Full Legal Name, Date of Birth, Current Residence

_____

_____

_____

10. Married or common law: _____
11. Do you now have a will? _____ Where is it? _____

_____

Do you have a codicil to the will? _____

12. Real Property: Describe in general._____

_____

Is the property in Joint Tenancy or Tenancy in common? _____

13. Savings Account: _____ Location: _____

Certificate of Deposits: _____ Location: _____

Stocks:_____

Bonds:_____

IRA's: _____

Other Assets: _____

14. Is the total value of the estate $500,000 to $600,000? Yes _____ No _____

15. Present health of testator? _____

_____

16. Present health of testator's spouse? _____

_____

17. Is this a potential nursing home client who may have Medicaid eligibility issues?

Transfers of Assets in the last 3 years? Yes or No? Explain.

18. Distribution of Assets:

Beneficiaries:

If your primary beneficiary does not survive you who is the alternative beneficiaries? _____

_____

How are the assets divided? _____

_____

19. Is there any person you want to exclude from receiving a devise from the estate? _____

Why? _____

_____

20. If minors are involved:

Guardian: _____

Alternative Guardian: _____

Power of Attorney: _____

21. Trust creation

Reason for minor trust includes Health Education Maintenance and Support

_____

_____

Do you want the income and principal to be distributed equally or within discretion of trustee? _____

22. Do you want a spendthrift clause? _____

23. Name of Trustee: _____

24. Alternative Trustee: _____

25. Do you want your trustee to be bonded (insured)? _____

26. Personal Representative (Administrator of Will)

If not the spouse why not? _____

Alternative Personal Representative: _____

27. Do you want the personal representative or alternative personal representative bonded?

28. Any property located outside of state of Montana? _____

_____

29. Do you want a special provision for distribution of personal property? This is a separate sheet of paper testator can change periodically without having to update the Last Will and Testament.

30. Special Instruction: _____

_____

31. Special Instruction: _____

_____

32. Special Instruction: _____

_____

33. Do you have a safe deposit box? _____

34. Do you want a living will? _____

35. Do you want to designate a person to make a decision on your continued health care if you are unable to do so? _____

36. Is this case a possible Power of Attorney client?

    Examine the alternatives.

    A) Statutory Power of Attorney

    B) Durable Power of Attorney

    C) Specific Power of Attorney

    D) Springing Power of Attorney

    E) Durable Power of Attorney for Health Care

37. Any physical or mental disability? _____

_____

38. Other: _____

_____

ESTATE PLANNING SHEET

FORM TWO

The following is an outline which may be used at an initial estate planning conference with clients. Some of the areas covered will not be applicable in every situation. In some cases, more questions will have to be asked.

CLIENT: _____

Address: _____

Home Phone: _____

Business Phone: _____

I. FAMILY BACKGROUND

A. Client and Spouse

	CLIENT	SPOUSE
1. Name:	_____	_____
a/k/a:	_____	_____
2. Date of Birth	_____	_____
3. Occupation	_____	_____
4. Employer of Firm	_____	_____
5. How long employed	_____	_____
6. Prior employment	_____	_____
7. Education	_____	_____
8. Money management and investment experience	_____	_____
9. Condition of Health	_____	_____
10. Nuptial agreements (Secure copy)	_____	_____
11. Social Security No.	_____	_____
12. Prior marriage	_____	_____
a. Date:	_____	_____.

b. Number of children

of prior marriage _____ _____
c. Financial obligations _____ _____
13. Have any children from prior marriage(s) been adopted by client or spouse? If so, list children:
a. Name _____ _____
a/k/a _____ _____
b. Date of birth
c. Natural or adopted child _____ _____
d. Address _____ _____
e. Occupation _____ _____
f. Education _____ _____
g. Financial Status _____ _____ h. Money management/
investment experience _____ _____
i Condition of health _____ _____
j. Marital status _____ _____
k. Spouse's name _____ _____
l. How long married _____ _____
m. Names and ages of children _____ _____
n. Discuss relationship between client and each child (and child's spouse, if child is married)
o. Are any of client's children deceased and if so are there any living issue of deceased child? If so, secure name and ages.

B. OTHER INFORMATION REGARDING FAMILY:

C. OTHER DEPENDENTS:

D. FINANCIAL AND OTHER ADVISORS:
1. Accountants
2. Life Insurance Agent

II. ASSETS OWNERSHIP AND FAIR MARKET VALUE

Joint Tenants

Description & location	Client	Spouse	(H&W)	In Common (H&W)
A. Real Property (Check deeds)	$_____	$_____	$_____	$_____
B. Mineral interests (Note whether production)	_____	_____	_____	_____
C. a. Savings account	_____	_____	_____	_____
b. Checking account	_____	_____	_____	_____
c. Certificates of deposit	_____	_____	_____	_____
D. Securities (other than closely held stock and US treasury bonds)	_____	_____	_____	_____
E. US Treasury Bonds "Flower Bonds"	_____	_____	_____	_____
F. Closely held stock	_____	_____	_____	_____
G. Leases	_____	_____	_____	_____
H. Outstanding Contracts/notes	_____	_____	_____	_____
I. Motor Vehicles (Excluding used in trade or business)	_____	_____	_____	_____
J. Motor Vehicles (used in trade of business)	_____	_____	_____	_____
K. Other machinery/equipment (used in business)	_____	_____	_____	_____
L. Household furnishings	_____	_____	_____	_____

Description & location	Client	Spouse	Joint (H&W)	Tenants In Common

M. Office furnishings	$_____	$_____	$_____	$_____
N. Collections	_____	_____	_____	_____
O. Jewelry or other personal effects of substantial intrinsic value	_____	_____	_____	_____
P. Livestock	_____	_____	_____	_____
Q. Brands	_____	_____	_____	_____
R. Grains	_____	_____	_____	_____
S. Life Insurance	_____	_____	_____	_____
1. Face value of insurance on self policy own byself	_____	_____	_____	_____
2. Cash value of policies on life of others	_____	_____	_____	_____
3. Face amount of policies on life of others	_____	_____	_____	_____
T. Employee/other death benefits	_____	_____	_____	_____
U. Deferred compensation	_____	_____	_____	_____
V. Powers of Appointment (obtain documents)	_____	_____	_____	_____
W. Annuities	_____	_____	_____	_____
Y. Other	_____	_____	_____	_____
TOTALS:	**$_____**	**$_____**	**$_____**	**$____**

III. DEBT

Description	Client	Spouse	Joint
A. Mortgages	$_____	$_____	$_____
B. Outstanding Contracts/notes	_____	_____	_____
C. Other	_____	_____	_____
TOTALS:	**$_____**	**$_____**	**$_____**

IV. BUSINESS INTERESTS

A. Name

B. Location

C. Business structure (sole proprietorship, partnership, corporation, or other)

If incorporated:

1. Sub-charter S ( ) or Conventional ( )
2. Classes of stock (describe each class)
3. Stock, Ownership
4. History of dividends declared and paid

D. If other than corporation, specify ownership arrangement...

E. Business agreements (buy-sell, etc., obtain copies)

F. Assets owned by business - when acquired

G. Estimate of fair market value of business

H. Estimate of basis

I. Gross income (prior year) _____ (estimate current) _____
Net income (prior year) _____ (estimate current) _____

J. Key employees

K. Salaries

L. Pension and profit sharing plans

M. Insurance programs

N. Future plans - desires insofar as family concerned.

V. JOINT PROPERTIES

A. Description

B. When joint tenancy created

C. How acquired (purchase, inheritance, gift, etc.)

D. Gift tax return filed

E. If real property, was election under IRC 1954, S2515(C) made?

F. What basis, if any, if there for establishing contribution by spouse?

G. Basis in property

H. Fair market value (estimate.)

VI. LIFE INSURANCE

Insured	Type of policy	Owner	Beneficiary	Face Value	Loan	Cash Value

VII. GIFT HISTORY

A. Gifts over $3,000 in any one year to single person. (Specify person relationship, date, nature and amount of gifts).

B. Gift Tax Returns filed: (Obtain copies)

C. Use of specific exemption after September 8, 1976.

D. Taxable gifts made after December 31, 1976.

E. Does client have a regular gifting program which is expected to be continued?

F. Amount of inter-spousal gifts made after December 31, 1976, marital deduction utilized (amount).

VIII. INCOME DATA

(Obtain copies of most recent federal and state income tax returns).

	Client	Spouse	Joint
A Wages, salaries	$_____	$ _____	$ _____
B. Dividends	_____	_____	_____
C. Interest	_____	_____	_____

	Client	Spouse	Joint
D. Net rents, royalties	$ _____	$ _____	$ _____
E. Partnership	_____	_____	_____
F. Sub-chapter S	_____	_____	_____
G. Annuities	_____	_____	_____
H. Pensions	_____	_____	_____
I. Trust and Estates	_____	_____	_____
J. Other	_____	_____	_____
TOTALS:	**$ _____**	**$ _____**	**$ _____**

Number of Exemptions claimed:	_____	_____	
Top federal income tax bracket:	_____%	_____%	_____%
Federal income taxes paid:	$ _____	$ _____	$ _____
State income taxes paid:	$ _____	$ _____	$ _____

IX. ESTIMATED FAMILY INCOME NEEDS AND SOURCES

A. Sources of Income	After Client's Death	After Client & Spouse□s Death
Wages, salaries	$ _____	$ _____
Dividends	_____	_____
Interest	_____	_____

Client & A. Sources of Income	After Client's Death	After Spouse's Death
Net rents, royalties	_____	_____
Trust and estate	_____	_____
Insurance proceeds Other death benefits	_____	_____
Pension	_____	_____
Social Security	_____	_____
Other	_____	_____
TOTALS:	**$ _____**	**$ _____**

B. Income Needs

Taxes (property & income)	$ _____	$ _____
Food, clothing	_____	_____
Housing	_____	_____
Medical	_____	_____
Insurance	_____	_____
Education	_____	_____
Entertainment	_____	_____
TOTALS:	**$ _____**	**$ _____**

X. WILLS

A. Date of Will

B. Dispositive provisions

C. Tax Liability (federal estate and state inheritance) using current estate values and distributing in accordance with wills, if any, or otherwise by intestate succession statute.

XI. NEW WILLS

A. Dispositive desires of Client and Spouse
1. Family
2. Charitable Organizations
3. Other

B. Personal Representative:
1. Name: _____
2. Address: _____
3. Relationship: _____

Successor Personal Representative:

C. Guardian(s):
1. Name: _____
2. Address: _____
3. Relationship: _____

Successor Personal Representative

1. Name: _____
2. Address: _____
3. Relationship:

D. Trustee(s)
1. Name:
2. Address
3. Relationship:

Successor Guardian(s)

1. Name
2. Address:
3. Relationship:

E. Special Requirements:
   1. Exercise of Power of Appointment
   2. Orphan's exclusion
   3. Disposition of certain personal items by means of separate writing.

"SAMPLE" WILL

WILL
OF
JOHN DAMIEN WHITE

I. INTRODUCTION

I, John Damien White, also known as J.D. White, domiciled and residing in Missoula, Missoula County, Montana, declare this to be my will, revoking all prior wills and codicils.

II. FAMILY INFORMATION

I am married to Mary Helen White. All references of "my wife" are to her. I have two (2) children, namely, David Baxter White and Cynthia Baxter White. All references to "my children" refer to the two children named in this paragraph and any other children hereafter born to or adopted by me and my wife.

III. PRE-RESIDUARY GIFTS

A. Gifts of Special Items:

If my sister, Mary Vivian Jones, 115 Main Street, Prairie City, Utah, survives me, I give her (and not her descendants) the Steinway grand piano which was given to me by my mother. If for any reason I do not own that Steinway grand piano at my death, the devise to my sister is canceled.

B. Tangible Personal Property List

If my wife survives me, I give her all of (the rest of) my tangible personal property.

If my wife fails to survive me, I might leave a written statement of list disposing of items of tangible personal property. If I do and if my written statement of list is found and is identified as such by my personal representative no later than 30 days after the statement or list is to be given effect to the extent authorized by law. Any tangible personal property not effectively disposed of by such a statement or list shall be distributed to my surviving children (and not to their descendants) as they

may agree. If my surviving children fail to reach agreement within 90 days after the probate of this will, such tangible personal property shall be divided among my surviving children as my personal representative determines appropriate, in shares of substantially equal value.

If any child of mine is a minor at the time of such division, my personal representative may distribute the child's share to the child or for the child's use to the child's guardian or to any person with whom the child is residing, without further responsibility, and the distributee's receipt shall be a sufficient discharge to my personal representative.

IV. RESIDUARY CLAUSE

If my wife survives me, I give her the residue of my estate. If she fails to survive me, I give the residue of my estate to my descendants who survive me by representation.

V. METHODS OF DISTRIBUTION TO CERTAIN BENEFICIARIES

If under this will any property is distributable to a minor or to a person under twenty-one (21) years of age, my personal representative in my personal representative's absolute discretion, may distribute such property in any manner permitted by law and additionally in any one or more of the following ways:

(A) If the person is a minor, directly to the minor or on behalf of the minor for the minor's exclusive benefit;

(B) If the person is a minor, to a guardian or conservator for the minor; or

(C) If the person is under twenty-one (21) years of age, to any person (including my personal representative) selected as a custodian by my personal representative under the applicable Uniform Transfers to Minors Act of any state.

VI. APPOINTMENT OF PERSONAL REPRESENTATIVE

I appoint my wife as personal representative of my estate. In the event she shall die, be adjudicated incompetent, or resign, I hereby name as successor personal representative to fill such vacancy or any vacancy that may thereafter occur, the first in the order named who is then willing and able to serve:

(A) Steve Johnson
(B) Arvid Thompson
(C) Norwest Capital Management & Trust Co., Montana

VII. POWERS OF PERSONAL REPRESENTATIVE

In addition to the powers given to my personal representative by law effective at death, my personal representative shall have all powers authorized by the Montana Uniform Probate Code, as that Code exists on the date of this will.

VIII. MONTANA LAW

This instrument shall be construed under the laws of the State of Montana.

IX. REPRESENTATION

The persons who take under this will as "descendants by right of representation" shall take in accordance with the rules of S72-2116 MCA as that section exists on this date of this will.

X. CAPTIONS

The captions set forth in this Will at the beginning of various provisions are for convenience of reference only, and shall not be deemed to define or limit the provisions of this Will, or to affect in any way its construction or application.

XI. CONCLUSION AND ATTESTATION

I, John Damien White, the testator sign my name to this instrument this _____day of_____**,** and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

_____
JOHN DAMIEN WHITE

We, witnesses, sign our names to this instrument, consisting of four pages, being first duly sworn, do hereby declare to the undersigned authority that the testator signs and executes this instrument as the testator's last will and that the testator signs it willingly (or willingly directs another to sign for the testator), that each of us, in the presence and hearing of the testator, hereby signs the will as a witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

_____
WITNESS
Residing at _____

_____

_____
WITNESS
Residing at _____

_____

Dated_____

STATE OF MONTANA)

County of Missoula)

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me by John Damien White, the testator, and subscribed and sworn to before me by the above-named witnesses, this _____day of _____,

_____.

_____
Notary Public for the State of Montana
Residing at:_____
My Commission expires:_____

(Notarial Seal)

Dated: _____

DECLARATION OF HOMESTEAD

_____ and _____

the undersigned, hereafter referred to as claimant(s), reside on and do hereby claim the following described property to be their homestead, which is exempt from attachment or forced sale pursuant to Section 7032-201, Montana Code Annotated.

The homestead property, claimed as exempt, is described as follows:

together with the dwelling house, or mobile home and improvements and appurtenances thereon.

IN WITNESS WHEREOF, I/we have set my/our hand(s) this day of,_____, _____.

_____ _____

(Signature of Claimant) (Signature of Claimant)

STATE OF MONTANA
County of _____) ss.

On this _____day of _____, _____, before me, a notary public for the State of Montana, personally appeared

_____

known to me (or proved to me on the oath of _____ to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that _ he _ executed the same.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my notarial seal the day and year first above written.

_____
Notary Public for the State of Montana
Residing at: _____
My commission expires: _____

(Notarial Seal)

INSTRUCTIONS FOR RECORDING HOMESTEAD EXEMPTION DECLARATIONS

1. PURPOSE OF HOMESTEAD EXEMPTION DECLARATION

If you complete this form and record it in the Clerk and Recorder's Office in the county in which you live and have your home, it exempts your homestead from creditors' claims except for mortgages and construction liens.

11. MEANING OF HOMESTEAD

The exemption protects the home you live in. You must actually reside on the property for it to be exempt. Homestead includes the dwelling house, or mobile home, and the land and improvements legally defined as appurtenances to the land. This may include a mobile home where the mobile home owner does not own the land the mobile home is situated on.

111. LIMIT ON VALUE EXEMPT

The maximum value of the exempt property is sixty thousand dollars. If the value exceeds sixty thousand dollars, the creditors may partition the land, selling part of it or may sell all the property. If they sell all the property you get the first sixty thousand dollars ($60,000.00) of the proceeds and this money is exempt from creditors for 18 months.

IV. WHO SHOULD SIGN

If married, both spouses should sign the declaration. If one does not sign, his or her interest in the property is not exempt. Both must sign in front of a notary.

NOTE: Under Montana property law, a spouse may acquire an interest in property due to the marriage, even though the spouse is not listed on the deed or other documents of title, and even though the spouse has not directly contributed money to pay for the property. Therefore, every effort should be made to have both spouses sign the declaration.

V. RECORDING DECLARATION

After the Homestead Exemption Declaration form on the other side is completed, signed, and notarized, record the form in the Office of the County Clerk and Recorder for the county in which the land (or mobile home) is located. The recording fee for a one page document is $6.00 and must be paid when the document is delivered to the Clerk and Recorder for recording.

REVOCABLE LIVING TRUSTS

by
Marsha A. Goetting, PhD, CFP, CFCS
Montana State University
Extension Service

Living trusts have been promoted as the ideal solution for Montanans who wish to secure a wide variety of financial planning objectives. Avoiding probate and taxes are the primary goals of some. Others are concerned about protecting assets for family members should they be confined to a nursing home for a long period of time. Another may feel the need for investment assistance because of his or her inexperience. Still others want a way to continue their business if they should become disabled. Are all these objectives possible? The answer is **yes** - but the most appropriate legal tool to accomplish each one may not be a living trust.

What is a Living Trust?

A revocable living trust is just what its name implies - one that is created during an individual's life that can be changed and terminated at any time. It is a legal arrangement by which an individual transfers ownership of assets to a trustee who manages the assets for the beneficiaries designated in the trust agreement. Beneficiaries named, in the trust agreement, can be the individual who formed the trust, friends., family members, a college, hospital, library, charity or other organization. Any type of asset - cash, certificate of deposits, stocks, bonds, life insurance or real estate - can be placed into a living trust.

The person providing assets for the trust is called the trustor or grantor. The grantor must actually change the title of ownership of each asset that will be placed in the trust from his or her name to ownership by the trust. The trustee manages the assets according to the directions in the trust agreement. The trustee can be the person creating the trust, several individuals, a corporate entity such as a bank or trust company, or any combination of these.

A trust agreement is a document containing instructions to the trustee stating, for example, who is to receive income from the trust and when and how it is to be

distributed. When the trust terminates, the agreement designates the distribution of the assets to the beneficiaries who are named in it.

Considerations in Forming a Living Trust

Consider the following issues to determine whether a living trust would fit into your specific financial planning goals.

Tax Consequences. A revocable living trust is sometimes promoted" as a tax avoidance tool. However, a living trust does not provide the tax savings that are often attributed to it. Income earned in a revocable living trust is taxed to the person creating it (grantor) and must be reported on his or her personal state and federal income tax returns. No federal gift tax is payable upon the creation of a revocable living trust because the trust can be changed at any time by the person forming it.

State and federal law require the value of revocable living trust property to be included in the grantor's estate upon death. Since the grantor is viewed as having control of the assets, their value must be included for determining federal estate and Montana inheritance and estate tax. Typically, the following rights are reserved by the grantor when he or she forms a living trust: to amend the trust, to change the beneficiaries, to change the trustee, to change the date of termination or to change the entire trust by revoking it and having the property returned.

If none of these rights or similar rights are retained by the grantor, then the trust becomes irrevocable and the value of the assets in it are subject to federal gift taxation at the time the trust is formed. At the death of the grantor, the value of assets in an irrevocable trust are not usually subject to the Federal estate and Montana inheritance and estate tax.

Probate Costs vs. Living Trust Costs. Probate in Montana is not nearly as burdensome as it is in other states that have not adopted the Uniform Probate Code. In some states probate can be quite costly, as the attorney and personal representative must appear before the court for approval of almost every act involved in probating an estate. In Montana, formal approval by the court is not required for any action authorized in the Uniform Probate Code. The Montana Uniform Probate Code specifically exempts from probate the following: assets in living trusts, property owned as joint tenants with right of survivorship, payable-on-death deposits, and life insurance payable to a named beneficiary.

How much of your present estate is subject to probate? Typically only solely-owned property or a deceased's share in tenancy in common property is subject to probate. However, even for non-probate property there are reporting requirements for inventory and Montana inheritance taxes, and perhaps Montana and federal income taxes.

Even if your property is subject to probate, your heirs have the right to ask the attorney to handle the case on an hourly fee basis which may be less than the maximum statutory percentage. In Montana the maximum charge allowed for the attorney is one and one half times (1 1/2) the amount allowable to the personal representative. The percentage for the personal representative (which is a maximum fee) is three (3%) percent of the first $40,000 and two (2%) percent in excess of that amount.

For example, on a $200,000 estate, a personal representative could receive a maximum of $4,400 and the attorney $6,600. ($40,000 X .03 = $1,200; $160,000 X .02 = $3,200; $1,200 + 3,200 = $4,400; $4,400 X 1.5 = $6,600).

An hourly fee could result in less expense for the estate and/or heirs, especially if the individual accomplished estate planning before his/her death.

There is no guarantee that a living trust will save money over probate. For example, if you use a paid trustee such as a bank or trust company, management fees over the years could easily exceed the cost of probate. Trust fees are often based on a percentage of income or principal, with annual minimums ranging from $500 to about $2,500 depending upon the institution. Many institutional trustees won't accept trusts with under $50,000 in assets.

Protecting Assets For Heirs. With nursing home costs averaging $30,000 a year, many parents are concerned with preserving assets for their heirs. one source of assistance is Medicaid. But to be eligible an applicant must not have cash and other non-exempt assets exceeding $2,000 as an individual. Assets in a living trust would be considered as non-exempt assets. A home placed in a living trust is not exempt from creditors' claims. The one exception to the general rule is the family home; as long as one spouse is living at home, he or she can't be forced to sell the home to pay for the other's nursing home care. The state of Montana, however, can make a creditor's claim on the estate after the surviving spouse has died to recoup the nursing home costs. However, the Montana homestead allowance protects value

in a home up to $60,000. The homestead allowance is exempt from and has priority over all claims against the estate.

In the past a spouse couldn't be forced to pay for more than a month of the care of an institutionalized spouse applying for Medicaid. Starting October 1, 1989, however, the spouse at home may be required to dip into his or her assets. A living trust would be considered as a non-exempt asset. For more specific information about the new requirements, contact your County Public Health and Human Services Office.

Those who are concerned about nursing home costs should explore a long-term care insurance policy to see if it would better meet their financial planning goals than does a living trust.

Is an Inexperienced Investor A Concern? There are many instances where inexperienced investors may prefer placing assets in a living trust until they feel the confidence to take over management themselves. For example, a recent widow had very little investment experience and did not want to be responsible for investing the sizable amount of money she received upon the death of her husband. Although she is willing to learn more about investing, she needed the emotional security of having someone else manage her assets for her, so she established a revocable living trust.

Incompetency. Advancing age, serious illness, or accident may render a person incapable of either supervising his or her investments and business, or making necessary payments for his or her well being. A revocable living trust could be a management tool in this case. As an example, a retired bachelor with only distant relatives suffered a severe heart attack and was away from his business for several months. As a result of that experience he chose two living trusts - one naming a corporate -- trustee for his investments and the other naming a trusted partner for the business. Under this arrangement his investments are being continually supervised and, if he should become incapacitated, the corporate trustee can step in to take care of his living expenses. An alternative to a living trust may be a power of attorney.

SUMMARY

Before establishing a living trust, make a list of financial planning objectives you wish to achieve. Then discuss your needs with professionals such as an attorney, a

trust officer, a certified public accountant and/or a certified financial planner. They may suggest an array of financial planning tools that could better help you achieve your goals than a living trust.

Living Trust Scams: Montana Seniors Beware

by: Rick Bartos

The popular television series Dragnet introduced us to Sergeant Friday. A constant fighter of crime, Sergeant Friday was always able to protect the innocent by asking for, "Just the facts." Here are a few facts about living trusts.

What is a living trust?

A living trust is an alternate way to own, manage and dispose of your property. It is much like a bank account in that you cannot see or touch the trust. The trust owns the property you transfer into it while you or someone you choose takes care of that property.

The living trust is created by a trust document. The document states who is creating the trust (grantor), who will manage the trust (the trustee), who will benefit from the trust (the beneficiary), and what property will become part of the trust.

You are the grantor of your living trust. You decide which pieces of your property should become part of the trust body. Your trust can include real estate, bank accounts, stocks, bonds and other personal property items. You decide if you want to transfer all or only some of your assets into your trust.

You may also be the trustee of your living trust. Being the trustee allows you to exercise full control of the property you have transferred into the trust. If you do not want to manage your living trust, you may appoint another person or a financial institution to do so for you.

Can I avoid probate with a living trust?

In many instances the answer is yes. However, the cost of buying a living trust and transferring your assets into the trust may well exceed any probate costs you may encounter.

Your assets must be properly transferred into the trust. If they are not, you might not avoid probate. Even if you have a proper trust, you still need a will to cover property you might have missed or which is later acquired and never transferred into the trust.

In many instances, if your property is held in joint tenancy with right of survivorship (husband and wife) you will not have to probate any property when the first spouse passes away. The surviving spouse has no legal need to probate. If the estate is less than $600,000 in value there will be no estate or inheritance taxes**.** Do not be misled by probate delay and fee horror stories**.** Not all individuals need a trust - not all probates are expensive or time consuming.

Can a living trusts save me estate or inheritance taxes?

No.

Can a living trust allow me to qualify for Medicaid if I were to enter a nursing home and thereby save my assets?

In virtually every instance the answer is no. It is unlikely a living trust will save any assets from the spend-down requirements to become Medicaid eligible.

What are the expenses of a living trust?

1. Cost of having the trust instrument drawn up to establish the trust.

2. Paying the trustee's fee.

3. Paying for transferring the assets into the living trust.

Why should I consult an attorney?

1. Licensed Montana attorneys must follow strict ethical standards. They are subject to review for their actions by the Commission on Practice and ultimately

the Montana Supreme Court.

2. Montana attorneys have at least 7 years of higher education. They are required to complete rigorous legal education training and testing.

3. In consulting an attorney, you establish an attorney-client relationship. The information you share with the attorney must be kept confidential. You continue to receive the services long after the trust document was created.

If you are reluctant to approach an attorney, your local Area Agency on Aging office have trained volunteer counselors to assist. Also your bank trust officer or a licensed or certified public accountant would be excellent resource people to assist you.

Many trust kits and commercial packages are sold by unlicensed persons claiming to be insurance salespersons or financial planners. They walk the line of unfair trade practices and the unauthorized practice of law. They exaggerate the time and cost considerations of probate. And because they are neither licensed or regulated, they may not keep your financial information confidential.

Why should I be cautious about the commercial trust packages?

1. These salesperson are not regulated by any local or state government consumer office.

2. Trust kits do not allow the trust to be tailored to your specific needs and goals. You receive no individualized legal or estate planning advice.

3. Commercial trust packages will more likely cost you more than it costs to have a lawyer establish a living trust.

4. Trust kits and commercial trust packages require you to transfer your property into your trust. This can be a time consuming and complicated task, involving the completion of new deeds and transfer documents. If you have an attorney establishing your trust the attorney can assist in transferring your property into your trust.

Where can I get the facts on living trusts?

Montana Office on Aging: 1-800-332-2272

Montana Attorney General Office: (406) 444-2026

Montana State Bar Elder Assistance Committee (406) 442-7660

REMEMBER: Determining if you really need a trust is the first step; correctly identifying your assets and tailoring the trust is the second step; and do not forget the third and critical step, legally and properly transferring assets into the trust.

They're your assets. It's your future. Be careful.

THE USES AND ABUSES OF REVOCABLE TRUSTS IN MONTANA: WHEN THEY ARE NEEDED AND WHEN THEY ARE NOT

E. Edwin Eck
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I. INTRODUCTION

A revocable trust is one where the trustor (settlor) has a right to revoke. In most states, this right to revoke must be retained by the trustor in the trust instrument. However, in Montana unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable. MCA $ 72-33401. Of course, from a drafting standpoint, it is preferable to include an express provision indicating the trustor's ability to revoke the trust.

Revocable trusts are often characterized as either "funded" or "unfunded". The primary purpose of the funded trust is to avoid probate of those assets which were placed in the trust prior to the trustor's death. The "unfunded" trust does not contain assets prior to the estate owner's death. Rather, the unfunded trust is to receive assets upon the death of the estate owner. Thus, the unfunded trust does not avoid probate.

The focus of this presentation is the funded revocable trust.

II. USES OF REVOCABLE TRUSTS

There are a variety of uses of such trusts.

A. Asset Management (during lifetime). An estate owner may

wish to have someone else manage assets for him or her during lifetime, but does not want to give up control. A number of circumstances could be cited where management by someone else is desirable. I will list three such circumstances:

1. Client A may have recently received a windfall but be inexperienced in asset management.

2. Client B may be intending to travel substantially. Client B wants someone else to handle the continuing monitoring of investments as well as the mechanics of transferring dividends and interest to a checking account.

3. Client C is an elderly person and no longer enjoys investment decision making.

In all of these circumstances, a revocable trust could be considered. In all of these cases, someone other than the trustor will be named trustee. While the trustee selection is beyond the scope of this outline, the client in need of asset management often considers the corporate trustee because of its investment experience.

This use of a revocable trust involving the selection of a corporate trustee is not one of the uses typically cited by promoters of revocable trusts. They focus on the "self-trusteed" trust, where the trustor is also the trustee.

B. Future Incapacity (during lifetime). An estate owner may fear a possible future incapacity. Without a revocable trust, if a Montanan became incapacitated, a conservatorship proceeding could be initiated under MCA 72-5-401 et seq. Critics of the conservatorship proceedings cite the following which they perceive to be disadvantages of a conservatorship.

- ♦ court costs;
- ♦ attorney fees;
- ♦ the potential publicity associated with a hearing concerning the alleged incapacity;

- the possibility of the court imposing bond (MCA 72-5-411);
- the requirement to inventory assets within 90 days of appointment (MCA 72-5-424);
- the limitations on conservators making gifts, conveying or releasing contingent interests, entering into contracts, creating trusts, exercising options to purchase, and other restraints of conservators' powers which require prior court approval (MCA 725-421 (3); the requirement of annual accounts (MCA 72-5-438).

With the use of a funded revocable trust, all of these disadvantages are avoided.

A revocable trust is not the sole devise used to avoid the disadvantages of a conservatorship. The estate owner can also utilize a durable power of attorney, to achieve the same goal. MCA 72-5-501.

C. Privacy in the disposition of assets (Probate Avoidance). A will is filed as part of the probate proceeding. MCA 72-3-203 (1) and 72-3-301 (1) (c). A revocable trust is not part of the public record. Thus, clients who wish to dispose of their assets privately are likely to find the revocable trust to be the preferred vehicle.

Examples of clients who wish private disposition include:

a parent who wishes to disinherit a child;

a parent who wishes to impose further trust restrictions on an adult child who is incapable of managing assets;

a man who is acknowledging the existence of an illegitimate child;

and a man or woman whose estate plan is beyond the mores of the community.

D. Privacy in the nature and value of assets (Probate Avoidance). The probate statutes of many states require the personal representative to file in court an inventory of the property owned by the decedent and to list fair market values as of the date of the decedent's death. Some clients do not wish the nature and extent of their assets to be part of the public record.

However, privacy in the nature and value of assets is not a valid reason to establish a revocable trust in Montana. MCA 72-3-607 (3), reads:

> **The personal representative shall send a copy of the inventory to interested persons who request it, or he may file the original of the inventory with the court. In any event, a copy of the inventory and statement of value shall be mailed to the Department of Revenue.**

Thus, a personal representative in Montana is not required to file an inventory with the court. While a copy must be mailed to the Department of Revenue, like all tax returns, such is not open to public examination.

E. Avoiding the fees and costs associated with probate (Probate Avoidance).

1. Effective July 1, 1992, the filing fee for the commencement of a probate is $70. MCA 25-1-201(l)(m).

2. The personal representative is required to publish a notice to creditors. MCA 72-3-801. Such results in publication fees which vary from newspaper to newspaper.

3. Personal representatives are entitled to reasonable compensation. Under Montana law, that compensation shall not exceed 3% of the estate for the first $40,000 of assets and 2% of the value of the estate in excess of $40,000 without court approval. MCA 72-3-63 1.

4. The compensation of the attorney shall not exceed I 1 1/2 times the compensation allowable to the personal representative. MCA 72-3-633. An interested person may file a motion for a court determination of the

"reasonableness" of the compensation of any person employed by the personal representative, including any attorney. MCA 72-3-634.

The Montana Supreme Court has concluded that these statutes require that the fee charged for legal services be reasonable. Such is ascertained by considering the time spent, the nature of the service, and the skill and experience required. ESTATE **OF** ROBERT E.. STONE, 768 P.2d 334, 336 (Mont. 1989). In the same case the court expressly rejected the argument that the percentages set forth in MCA 72-3631 and 72-3-633 are "standard fees

The use of the statutory maximum fee as a "standard fee" is fundamentally incorrect. Sections 72-3631 and 72-3-633, MCA, provide that fees for personal representatives or attorneys shall not exceed certain amounts based on the size of the estate. ESTATE **OF** ROBERT E. STONE, 768 P.2d 334, 336 (Mont. 1989).

A contrast of legal fees associated with probate and those fees associated with a revocable trust, must also include a comparison of the fees associated with drafting the related documents and the necessary asset transfers during the estate owner's life.

Because of the lack of published and reliable data concerning all of these fees, it is simply difficult, if not impossible, to make any certain comparisons. Further, it is likely that fees vary substantially from lawyer to lawyer. Also, the same lawyer might charge different amounts to different clients for performing similar services depending upon the responsibility assumed, the matter's complexity, and the time devoted to the project. These variances in fees and the lack of data concerning fees opens the door for irresponsible advocates of revocable trusts and the advocates for probate to overstate their positions.

The following table includes the following assumptions:

1 . The attorney charged an hourly fee of $90 for both the pre-mortem drafting and the post-mortem administration. If instead the attorney charged a percentage fee for the probate work, the total fees for the will and probate would be much greater for all but the smallest estates.

2. The time associated with pre-mortem drafting and -asset transfers is three times greater with a trust than with a will. This assumption is based upon

limited anecdotal evidence

3. The post-mortem time associated with a probate estate administration is five hours greater than that associated with a trust estate administration. This figure should be substantially greater if a formal probate proceeding was utilized. Conversely, there easily could be less than five additional hours in an informal probate where no accounting were required MCA 72-3-1005 (3

F. Avoiding the delays associated with probate (Probate Avoidance) The public perceives that there are a number of delays associated with probate,. In fact, the Montana Uniform Probate Code does set certain time periods which must elapse before the estate can be closed. A creditor has four months after the date of the first publication of notice to creditors within which to file a claim. MCA 72-3-801. An estate cannot be closed by a sworn statement until the expiration of six months after the date of the original appointment of the personal representative. MCA 72-31004. No corresponding restrictions are applicable to a revocable trust.

However, death tax considerations may keep both a probate estate and a trust estate in existence well after the death of the decedent. If a distribution is subject to Montana inheritance taxation, both a personal representative of a probate estate and a trustee of a trust may delay closing until 18 months after the decedent's death in order to postpone the payment of tax and still qualify for the 5% discount of MCA 72-16-440.

If the value of the gross estate exceeds the applicable exclusion amount, a federal estate tax return must be filed within 9 months after the decedent's death. IRC 6018 and 6075. If either a probate estate or a trust estate contains assets which are difficult to value or assets which raise other estate tax issues, it is nor unreasonable to assume that the fiduciary will need the full nine months to collect the data necessary to complete the return. Further, the Internal Revenue Service has three years after the return was filed, to audit and assess additional tax. IRC 6501. This three year period applies both to a probate estate and to a trust estate.

In summary, while a probate estate does require that certain time periods elapse prior to closure, both the probate estate and the trust estate face the same tax considerations which could mean the continuation of the estate.

This concern about delays is sometimes denominated a "psychological cost" of

probate. Those who raise this issue argue that the probate process is a continuing traumatic reminder of the loss of a loved one. Of course, the post-mortem administration of a revocable trust is subject to the same argument. The real issues are whether the probate process in fact takes longer to complete and, if so, whether that additional time is perceived as a real disadvantage.

G. Avoiding probate generally. As noted, one primary use of the revocable trust is simply to avoid probate generally. Without identifying any specific perceived undesirable characteristic of probate, such as a lack of privacy or excessive cost, some of the public simply believe that probate is bad.

III. PROMOTERS OF REVOCABLE TRUST

Unfortunately, there are a variety of unscrupulous promoters of revocable trusts who make misstatements and misleading statements concerning their uses. The following is a listing of such statements and one teacher's response.

A. A revocable trust can save taxes which cannot be saved though a will and probate.

> **False.** To a considerable extent a revocable trust is disregarded for all tax purposes. For gift tax purposes, the transfer of assets to a revocable trust is not a taxable gift because of the trustor's power to revoke renders that transfer incomplete. For income tax purposes,. the income, deductions, and credits of the trust are attributed to the trustor. IRC □□ 676 and 671. For estate tax purposes, all of the trust's assets are included in the trustor's gross estate. IRC □2038.

A common estate tax planning technique is the use of a "bypass□ "B□, or "credit shelter" trust. Assets placed in such a trust are not subject to estate taxation upon the death of the surviving spouse. Often the maximum amount of assets which can be sheltered against the estate tax unified credit of IRC □ 2010 are placed in such a trust.

These trust provisions can be part of a will (a testamentary trust) funded upon the death of the estate owner. The same trust provisions can be made part of a revocable trust. The same estate tax savings can be achieved either instrument.

B. A will is subject to possible contests. A revocable trust is not subject to contest, or is subject to contest to a lesser degree.

ESSENTIALLY FALSE. Montana has cases which indicate that gratuitous transfers by trust are subject to attack on the basis of a lack of capacity, undue influence, and fraud. See e.g ADAMS v. ALLEN, 679 P.2D 1232 (Mont. 1984). These same grounds can be used to attack a transfer by will.

Perhaps one could argue that the Montana Uniform Probate Code's notice requirements might encourage a contest. For example, MCA 72-3-603 requires a personal representative to give notice of his appointment to the decedent's heirs and devises within 30 days of the personal representative's appointment. No similar requirement exists for revocable trusts upon the death of the trustor. However, I think that if there is evidence of a lack of capacity, undue influence, or fraud, a substantial gratuitous transfer will be attacked whether the transfer is made by trust or will.

C. Assets placed in a revocable trust are not subject to creditor attack.

FALSE During the trustor's lifetime, property in a revocable trust is subject to the claims of the trustor's creditors. MCA 72-36-301. After the trustor's death, trust property is subject to the claims of the creditors of the decedent trustor's estate. MCA 72-36-302.

D. Assets placed in a revocable trust are not subject to a spouse's claim for an elective share.

FALSE Assets placed in a revocable trust are included in the trustor's augmented estate and subject to the spouse's right of election. MCA 72-2-705(l)(b) and 72-2-702.

E. Assets placed in a revocable trust are not counted for Medicaid purposes.

FALSE. The income and principal of a trust is treated as an available resource of the trustor for Medicaid purposes if the trust was established by the trustor during the trustor's lifetime. 42 USC 1396a(k).

F. One may transfer assets at death in trust wherein a second person Is a discretionary beneficiary. The second person does not have to count those assets for Medicaid purposes.

ESSENTIALLY TRUE. If such a trust is a testamentary trust (i.e., if the trust was created by will), the assets of such a trust are expressly excluded by statute. 42 USC 1396a(k). There is no similar express statutory exclusion if the discretionary trust provisions are part of a revocable trust. Policy considerations could argue that there should be no distinction between either trust since the discretionary beneficiary cannot force a distribution to him/herself in any event. Nevertheless, a cautious practitioner might prefer a discretionary trust created by will over one created by a revocable trust in such a circumstance.

G. A probate proceeding necessarily Includes many court hearings.

FALSE An estate can be probated informally under the **Montana Uniform Probate** Code. While documents have to be filed with the Clerk of Court, NO HEARINGS ARE REQUIRED**.** MCA 72-3-201 et seq.

H. Everyone needs a revocable trust.

FALSE In Montana there are some good reasons to consider a revocable living trust. Perhaps a client desires asset management by another person or a trust company. Perhaps a client desires privacy in the disposition of his assets. Or perhaps, a client owns real property in another state where probate proceedings are more cumbersome of clearly costly.

While there are good reasons for some to consider revocable trusts, there is no good reason for everyone to adopt a revocable trust. Potential disadvantages must be considered.

First, typically revocable trusts are more expensive than wills to create. Trust instruments are usually more complex than wills. Also, time has to be devoted to assets transfers.

Second, simplicity favors retaining assets in the name of the estate owner. During the estate owner's lifetime there is no trust instrument which must be provided to a stockbroker, a title company, or other third party.

One alternative for a married couple who wants to avoid probate is to place assets in joint tenancy with rights of survivorship and adopt durable powers of attorney.

IV. THE TRANSFER AND HOLDING OF ASSETS IN REVOCABLE TRUSTS: CONSIDERATIONS PRIOR TO THE TRUSTOR'S DEATH

A. Title to assets should be transferred to "[name of trustee], trustee under Trust Agreement dated [date of execution] between [name of trustee] and [name of trustor]." Some trust drafters also provide a name for the trust in the trust instrument and include that name in the title of transferred assets.

B. If a partnership interest is to be transferred, any written partnership agreement should be examined. Express procedures for making the trustee an assignee of the partnership interest should be followed. Written consent of the other partners may be necessary. If a limited partnership interest is being transferred, it will also. be necessary to amend the certificate of limited partnership.

C. If real property is to be transferred, the trustor's title insurance policy should be examined to see if the title company's guarantee will be sufficient after the transfer.

If the property is subject to an encumbrance, the deed of trust or the mortgage should be examined to see if it includes a "due on transfer" clause. Some practitioners as a matter of course obtain express written permission from the lender before making a transfer of encumbered property to a revocable trust.

D. If an asset does not have title, a written assignment should be prepared. Some practitioners who routinely include clauses in wills authorizing the use of a separate writing to dispose of tangible personal property as provided in MCA 72-2-312, include similar clauses in both the pour over will and in the revocable trust. Thus, even if such an asset was not effectively transferred in trust prior to the trustor's death, the dispositive provisions of both the will and the trust are identical.

E. Stock in an S corporation can be held in a revocable trust. IRC 13 61 (c)(2)(A)(I) provides that when the grantor is treated for general income tax purposes as the owner of a trust, as is the case with a revocable trust, such a trust may own stock in an S corporation without jeopardizing the S election.

F. The transfer of an installment obligation to a revocable trust is not a disposition of the obligation which would result in a realization of the untaxed profit at the time of transfer. Rev. Rule. 76613. 1974 2 C. 3. 153.

Some uncertainty can arise if the installment obligation is owned by husband and wife and a transfer is intended to a trust which is revocable by only one spouse. One alternative is to make the transfer in two distinct steps. First, one spouse could simply make an outright transfer of his interest in the obligation to the other spouse. This transfer should not result in the recognition of gain. IRC 45313(g)(1) and 1041. Second, the transferee spouse could make a subsequent transfer to her revocable trust.

G. The transfer of Series EE U.S. savings bonds to a revocable trust does not cause the acceleration of recognition of bond interest. Rev. Rul. 58-2, 1958-1 C.B. 236. PLR 9009053.

H. The capital gains exclusion on the sale of a principal residence is not affected if title to the house is held in trust. IRC 121 provides a capital gains exclusion of up to $125,000 to a person over the age of 55 who sells his principal residence. This exclusion is obtainable even when the title to the home is held in a revocable trust. PLR 8007050.

I. "Flower" bonds may be held by a revocable trust. Certain outstanding U.S. government bonds are eligible for redemption at par for the payment of the federal estate tax. When such bonds are held in a revocable trust, either (1) the trust instrument must require the trustee to pay all or a pro rata portion of the estate tax or (2) statutes in the decedent's domicile must require the trustee to pay the tax or the proportionate share of the tax that is attributable to the trust assets. While MCA 72-16-603 is such an apportionment statute, it is preferable that the trust instrument require the trustee to pay such taxes. Any tax apportionment provisions of a pour over will should be, consistent with the trust instrument.

J. The trust instrument and a durable power of attorney should be drafted so that the trustee could make similar distributions to an agent who in turn could make

gifts to third parties.

K. Generally trusts must have their own identification numbers and file their own income tax returns, unless they have under $600 in gross income. IRC 6012(a)(4). Most grantor trusts are subject to these same requirements, although all of the items of income, deduction, and credit are included in the computation of the trustor's personal income tax liability. Regs. 1.6019-3(a)(1), 3(a)(9).

However, if the trustor or the trustor's spouse is a trustee or a co-trustee of a revocable trust, such a trust does not need its own identification number and no trust income tax return need be filed. Regs. 1.671-4 and 301.6109-1(a)(2).

V. THE REVOCABLE TRUST AFTER THE TRUSTOR'S DEATH

A. Transfer of assets. The trust instrument may provide for trust termination upon the death of the trustor. If the trustor is also the trustee, a successor trustee would serve. Typically that successor is designated in the trust instrument. However, if no practical method of appointment is included in the trust instrument, a co-trustee or a beneficiary may petition to court to fill the vacancy. The court is to give consideration to the wishes of trust beneficiaries who are 14 years of age or older. MCA 72-33-621.

The successor trustee will need to present proof to third parties with whom the trustee must deal that he or she is properly acting as trustee. If the successor trustee is court appointed, a copy of the trustor's death certificate and a certified copy of the court order should suffice.

If the successor trustee is not court appointed, the procedure is less certain and will likely vary from third party to third party. Perhaps a copy of the trustor's death certificate and a verified copy of the trust instrument will satisfy the requirements of most third parties. If a third party requires that the copy of the trust instrument be certified by a public official (clerk and recorder or clerk of court), the revocable trust's advantage of privacy in disposition of assets would be lost.

In the case of Montana real property, the identify of any successor trustee may be established by a recorded affidavit of the successor trustee specifying: (1) his name, (2) his address, (3) the date of his succession, (4) the circumstances of his succession, and (5) confirming that he is currently lawfully serving as trustee. MCA 72-36-206(6).

B. S Corporation stock. After the trustor's death, the trust becomes irrevocable. The irrevocable. The trust may continue to hold S stock for two years after the trustor's death. IRC $ 136(c)(2) (A)(ii). Unless the continuing trust provisions satisfy the requirements of a "qualified Subchapter S trust'' as specified in IRC $ 136 1 (d)(3), the corporation will lost its S status.

RIGHTS OF THE TERMINALLY ILL ACT

The **"Montana Rights of the Terminally Ill Act"** (also known as the Montana Living Will Act") allows individuals the maximum possible control over their own medical care and inevitable death. The law allows you to declare your intent not to have life sustaining treatment which only prolongs the process of dying. This Declaration becomes effective if your attending physician determines you have an incurable or irreversible condition that will result in death in a relatively short time.

The law provides immunity for physicians and facilities which carry out the provisions of the living will. It also provides a procedure which requires the physician who will not honor your living will to so notify you, and transfer you to another physician who will comply with your wishes. There are provisions in the law which address revocation of the living will. You have the ability to revoke this declaration at anytime and in any manner. There are also provisions allowing you the option of designating another to make the decisions regarding withholding or withdrawal of life sustaining treatment.

If you do not write a living will, or you do not designate another to make these decisions, the law provides a list of individuals who will be allowed to make the decision for you, in the following order:

1) spouse;
2) adult child or majority of your adult children;
3) parents;
4) adult sibling or majority of your adult siblings;
5) nearest other adult relative.

Living wills have no affect on life insurance or on annuities.

Before considering a "living will" there are three important points to bear in mind.

1. First, a "living will" is only used when you can no longer participate in the decision making process surrounding your treatment and you have been diagnosed with a terminal condition which will result in death in a short period of time. As long as you remain competent you may refuse or accept treatment, regardless of the existence of a living will.
2. Second, the living will is a personal statement which should reflect your

end of life treatment desires. It should be developed by you, with consultation with your attorney if you wish to use one. You may wish to discuss this topic with loved ones and your personal doctor or health nurse. Any generic or standardized form of a living will should be examined to ensure that it reflects your wishes.

3. Third, the validity and composition of living wills may vary from state to state. If you anticipate spending a substantial amount of time in another state, you should research that state's law.

If you have decided to exercise your right to a living will, please consider the following steps:

A. Do the research. Materials and other samples may be obtained from a variety of sources (for example I : Montana Senior Citizens' Association; American Lung Association of Montana; or Montana Code Annotated). Be positive that your ideas concerning the nature of incompetency which triggers the use of the will, the severity of the medical condition necessary to withhold treatment, and the types of treatment to be withheld are expressed in the document.

B. Consider carefully who will serve as witnesses. Although Montana law has little to say concerning witnesses, other states have set out more specific requirements. As a general rule, your attending physician or other medical personnel who may be attending to you in time of illness should not act as witnesses. In some states relatives may not act as witnesses.

C. The living will should be easily accessible to those. likely to be involved in a time of emergency. Copies of the executed document should be in your medical records, and family members and your personal physician should also have a copy. You may also want to carry a card in your wallet or purse stating the existence of your living will and how it may be located.

D. A living will should be re-executed, or rewritten, at relatively frequent intervals. This will add to the perception that the document truly reflects your wishes.

E. Remember, you have the ability to revoke the living will at anytime and in any manner.

Like a testamentary will, the living will allows you to maintain your right to self-determination. It is a document of great significance which requires research and reflection before drafting. Contact your local Area Agency on Aging for additional information if you feel it is necessary.

Use the form on the following page if you want to appoint someone else (who is of sound mind and 18 years of age or older) to make the decisions for you about withholding or withdrawing life-sustaining treatment. If your appointee is unavailable or unwilling to serve as your designee, your doctor will make the determination. If you use the form, check with the people you want to be designees to make sure they are willing to so serve.

DECLARATION
LIVING WILL

If I should have an incurable and irreversible condition, that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician, cause my death within a relatively short time and I am no longer able to make decisions regarding my medical treatment, I appoint or, if he or she is not reasonably available or is unwilling to serve to make decisions on my behalf regarding withholding or withdrawal of treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain, pursuant to the Montana Rights of the Terminally Ill Act.

If the individual I have appointed is not reasonably available or is unwilling to serve, I direct my attending physician, pursuant to the Montana Rights of the Terminally Ill Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain.

Signed this _____day of _____ _____

Signature: _____

City, County, and State of Residence: _____

The declarant voluntarily signed this document in my presence.

Witness: _____

Address: _____

Witness: _____

Address: _____

Name and address of designee.

Name: _____

Address: _____

DECLARATION
LIVING WILL

If I should have an incurable or irreversible condition, that without the administration of life-sustaining treatment, will, in the opinion of my attending physician, cause my death within a relatively short time and I am no longer able to make decisions pursuant to the Montana Rights of the Terminally Ill Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary to my comfort or to alleviate pain.

Signed this _____ day of, _____, _____.

Signature: _____

City, County and State of Residence: _____

The declarant voluntarily signed this document in my presence.

Witness: _____

Address: _____

Witness: _____

Address: _____

REVOCATION OF DECLARATION (LIVING WILL)

I, _____ hereby revoke my Declaration (Living Will) regarding withholding or withdrawal of life-sustaining treatment in the event I am in a terminal condition which will result in my death in a short period of time.

This revocation is effective immediately and must be communicated to my attending physician and other health care providers as soon as possible.

Dated this _____ day of _____, _____.

_____
(Signature)

RIGHTS OF THE TERMINALLY ILL ACT

Excerpts from Montana Codes Annotated
Title 50, Chapter 9

50-9-102 Definitions. As used in this chapter, the following definitions apply:
(1) "Attending physician" means the physician selected by or assigned to the patient, who has primary responsibility for the treatment and care of the patient.

(2) "Board" means the Montana state board of medical examiners.

(3) "Declaration" means a document executed in accordance with the requirements of 50-9-103.

(4) "Department" means the department of public health and human services provided for in 2-15-2201 .

(5) "Emergency medical services personnel" means paid or volunteer firefighters, law enforcement officers, first responders, emergency medical technicians, or other emergency services personnel acting within the ordinary course of their professions.

(6) "Health care provider" means a person who is licensed, certified, or otherwise authorized by the laws of this state to administer health care in the ordinary course of business or practice of a profession.

(7) "Life-sustaining treatment" means any medical procedure or intervention that, when administered to a qualified patient, serves only to prolong the dying process.

(8) "Living will protocol" means a locally developed, community-wide method or a standardized, statewide method developed by the department and approved by the board, of providing palliative care to and withholding life-sustaining treatment from a qualified patient under 50-9-202 by emergency medical service personnel.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(10) "Physician" means an individual licensed under Title 37, chapter 3, to practice medicine in this state.

(11) "Qualified patient" means a patient 18 years of age or older who has executed a declaration in accordance with this chapter and who has been determined by the attending physician to be in a terminal condition

(12) "Reliable documentation" means a standardized, statewide identification card, form, or a necklace or bracelet of uniform design, adopted by a written, formal understanding of the local community emergency medical services agencies and licensed hospice and home health agencies, that signifies and certifies that a valid and current declaration is on file and that the individual is a qualified patient.

(13) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

(14) "Terminal condition" means an incurable or irreversible condition that, without the administration of life-sustaining treatment will, in the opinion of the attending physician, result in death within a relatively short time.

50-9-103. Declaration relating to use of life-sustaining treatment -designee.
(1) An individual of sound mind and 18 or more years of age may execute at any time a declaration governing the withholding or withdrawal of life-sustaining treatment. The declarant may designate another individual of sound mind and 18 or more years of age to make decisions governing the withholding or withdrawal of life-sustaining treatment. The declaration must be signed by the declarant, or another at the declarant's direction, and witnessed by two individuals. A physician or health care provider may presume, in the absence of actual notice to the contrary, that the declaration complies with this chapter and is valid.

(2) A declaration directing a physician to withhold or withdraw life-sustaining treatment may, but need not, be in the following form:

DECLARATION

If I should have an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician, cause my death within a relatively short time and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician, pursuant to the Montana Rights of the Terminally Ill Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary to my comfort or to alleviate pain.

Signed this _____. day of _____, _____.

Signature _____

City, County, and State of Residence _____

The declarant voluntarily signed this document in my presence.

Witness _____

Address _____

Witness _____

Address _____.

(3) A declaration that designates another individual to make decisions governing the withholding or withdrawal of life-sustaining treatment may, but need not, be in the following form:

DECLARATION

If I should have an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician, cause my death within a relatively short time and I am no longer able to make decisions regarding my medical treatment, I appoint _____or, if he or she is not reasonably available or is unwilling to serve _____ to make decisions on my behalf regarding withholding or withdrawal of treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain, pursuant to the Montana Rights of the Terminally Ill Act.

If the individual I have appointed is not reasonably available or is unwilling to serve, I direct my attending physician, pursuant to the Montana Rights of the Terminally Ill Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain.

Signed this _____ day of _____, _____.

Signature _____.

50-9-104. Revocation of declaration.

(1) A declarant may revoke a declaration at any time and in any manner, without regard to mental or physical condition. A revocation is effective upon its communication to the attending physician or other health care provider by the declarant or a witness to the revocation. A health care provider or emergency medical services personnel witnessing a revocation shall act upon the revocation and shall communicate the revocation to the attending physician at the earliest opportunity. A revocation communicated to a person other than the attending physician, emergency medical services personnel, or a health care provider is not effective unless the attending physician is informed of it before the qualified patient is in need of life-sustaining treatment.

(2) The attending physician or other health care provider shall make the revocation a part of the declarant's medical record.

50-9-105. When declaration operative.

(1) A declaration becomes operative when:

(a) it is communicated to the attending physician; and

(b) the declarant is determined by the attending physician to be in a terminal condition and no longer able to make decisions regarding administration of life-sustaining treatment.

(2) When the declaration becomes operative, the attending physician and other health care providers shall act in accordance with its provisions and with the instructions of a designee under 50-9-103(l) or comply with the transfer requirements of 50-9-203.

50-9-106. Consent by others to withholding or withdrawal of treatment.

(1) If a written consent to the withholding or withdrawal of the treatment, witnessed by two individuals, is given to the attending physician, the physician may withhold or withdraw life-sustaining treatment from an individual who:

(a) has been determined by the attending physician to be in a terminal condition and no longer able to make decisions regarding the administration of life-sustaining treatment; and

(b) has no effective declaration.

(2) The authority to consent or to withhold consent under subsection (1) may be exercised by the following individuals, in order of priority:

(a) the spouse of the individual;

(b) an adult child of the individual or, if there is more than one adult child, a majority of the adult children who are reasonably available for consultation;

(c) the parents of the individual;

(d) an adult sibling of the individual or, if there is more than one adult sibling, a majority of ’the adult siblings who are reasonably available for consultation; or

(e) the nearest other adult relative of the individual by blood or adoption who is reasonably available for consultation.

(3) If a class entitled to decide whether to consent is not reasonably available for consultation and competent to decide or if it declines to decide, the next class is authorized to decide. However, an equal division in a class does not authorize the next class to decide.

(4) A decision to grant or withhold consent must be made in good faith. A consent is not valid if it conflicts with the expressed intention of the individual.

(5) A decision of the attending physician acting in good faith that a consent is valid or invalid is conclusive.

(6) Life-sustaining treatment cannot be withheld or withdrawn pursuant to this section from an individual known to the attending, physician to be pregnant so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment.

50-9-107. When health care provider may presume validity of declaration. In the absence of knowledge to the contrary, a physician or other health care provider may assume that a declaration complies with this chapter and is valid.

50-9-108. Effect of previous declaration. An instrument executed before October 1,1991, that substantially complies with 50-9-103(l) is effective under this chapter.

50-9-109. Reserved.

50-9-110. Authority to adopt rules. The department may adopt rules to implement this chapter.

50-9-111. Recognition of declarations executed in other states. A declaration executed in a manner substantially similar to 50-9-103 in another state and in compliance with the law of that state is effective for purposes of this chapter.

PART 2
Effect on Health Care -- Rights and Duties

50-9-201. Recording determination of terminal condition and content of declaration. Upon determining that a declarant is in a terminal condition, the attending physician who knows of a declaration shall record that determination and the terms of the declaration in the declarant's medical record.

50-9-202. Treatment of qualified patients.

(1) A qualified patient may make decisions regarding life-sustaining treatment so long as the patient is able to do so.

(2) This chapter does not affect the responsibility of the attending physician or other health care provider to provide treatment, including nutrition and hydration, for a patient's comfort care or alleviation of pain.

(3) Life-sustaining treatment cannot be withheld or withdrawn pursuant to a declaration from an individual known to the attending physician to be pregnant so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment.

50-9-203 Transfer of patients. An attending physician or other health care provider who is unwilling to comply with this chapter shall take all reasonable steps as promptly as practicable to transfer care of the declarant to another physician or health care provider who is willing to do so. If the policies of a health care facility preclude compliance with the declaration of a qualified patient under this chapter, that facility shall take all reasonable steps to transfer the patient to a facility in which the provisions of this chapter can be carried out.

50-9-204. Immunities.

(1) In the absence of actual notice of the revocation of a declaration, the following, while acting in accordance with the requirements of this chapter, are not subject to civil or criminal liability or guilty of unprofessional conduct:

(a) a physician who causes the withholding or withdrawal of life-

sustaining treatment from a qualified patient;

(b) a person who participates in the withholding or withdrawal of life-sustaining treatment under the direction or with the authorization of a physician;

(c) emergency medical services personnel who cause or participate in the withholding or withdrawal of life-sustaining treatment under the direction of or with the authorization of a physician or who on receipt of reliable documentation follow a living will protocol;

(d) emergency medical services personnel who proceed to provide life-sustaining treatment to a qualified patient pursuant to a revocation communicated to them; and

(e) a health care facility in which withholding or withdrawal occurs.

(2) A physician or other health care provider whose action under this chapter is in accord with reasonable medical standards is not subject to civil or criminal liability or discipline for unprofessional conduct with respect to that decision.

(3) A physician or other health care provider whose decision about the validity of consent under 50-9-106 is made in good faith is not subject to criminal or civil liability or discipline for unprofessional conduct with respect to that decision.

(4) An individual designated pursuant to 50-9-103(l) or an individual authorized to consent pursuant to 50-9-106, whose decision is made or Consent is given in good faith pursuant to this chapter, is not subject to criminal or civil liability or discipline for unprofessional conduct with respect to that decision.

50-9-205 Effect on insurance -- patient's decision.

(1) Death resulting from the withholding or withdrawal of life-sustaining treatment in accordance with this chapter does not constitute, for any purpose, a suicide or homicide.

(2) The making of a declaration pursuant to 50-9-103 does not affect the sale, procurement, or issuance of any policy of life insurance or annuity, nor does it affect, impair, or modify the terms of an existing policy of life insurance. A policy of life insurance is not legally impaired or invalidated by the withholding or withdrawal of life-sustaining treatment from an insured, notwithstanding any term of the policy to the contrary.

(3) A person may not prohibit or require the execution of a declaration as a condition for being insured for or receiving health care services.

(4) This chapter creates no presumption concerning the intention of an individual who has revoked or has not executed a declaration with respect to the use, withholding, or withdrawal of life-sustaining treatment in the event of a terminal condition.

(5) This chapter does not affect the right of a patient to make decisions regarding use of life-sustaining treatment, so long as the patient is able to do so, or impair or supersede a right or responsibility that any person has to effect the withholding or withdrawal of medical care.

(6) This chapter does not require a physician or other health care provider to take action contrary to reasonable medical standards.

(7) This chapter does not condone, authorize, or approve mercy killing or euthanasia.

DO NOT RESUSCITATE -- NOTIFICATION
Part 1 General

50-10-101 Definitions. As used in this part, unless the context clearly requires otherwise, the following definitions apply:

(1) "Attending physician" has the meaning provided in 50-9-102.

(2) "Board" means the state board of medical examiners.

(3) "Department" means the department of public health and human services provided for in 2-15-2201.

(4) "IDNR identification" means a standardized identification card, form, necklace, bracelet of uniform size and design, approved by the department, which signifies that the possessor is a qualified patient, as defined in 50-9-102; or that the possessor's attending physician has issued a do not resuscitate order for the possessor and has documented the grounds for the order in the possessor's medical

file.

(5) "Do not resuscitate order" means a directive from a licensed physician that emergency life-sustaining procedures should not be administered to a particular person.

(6) "Do not resuscitate protocol" means a standardized method of procedure, approved by the board and adopted in the rules of the department, for the withholding of emergency life-sustaining procedures by physicians and emergency medical services personnel.

(7) "Emergency medical services personnel" has the meaning provided in 50-9-102.

(8) "Health care facility" has the meaning provided in 50-5-101.

(9) "Life-sustaining procedure" means cardiopulmonary resuscitation or a component of cardiopulmonary resuscitation.

(10) "Physician" means a person licensed under Title 37, chapter 3, to Practice medicine in this state.

50-10-102. Immunities.

(1) The following are not subject to civil or criminal liability and are not guilty of unprofessional conduct upon discovery of DNR identification upon a person:

- **(a)** a physician who causes the withholding or withdrawal of life-sustaining procedures from that person;
- **(b)** a person who participates in the withholding or withdrawal of life-sustaining procedures under the direction or with the authorization of a physician;
- **(c)** emergency medical services personnel who cause or participate in the withholding or withdrawal of life-sustaining procedures from that person;
- **(d)** a health care facility in which withholding or withdrawal of life-sustaining procedures from that person occurs;
- **(e)** physicians, persons under the direction or authorization of a physician, emergency medical services personnel, or health care facilities that provide life-sustaining procedures pursuant to an oral or

written request communicated to them by a person who possesses DNR identification.

(2) The provisions of subsections (1)(a) through (1)(d) apply when a life-sustaining procedure is withheld or withdrawn in accordance with the do not resuscitate protocol.

(3) Emergency medical services personnel who follow a do not resuscitate order from a licensed physician are not subject to civil or criminal liability and are not guilty of unprofessional conduct.

50-10-103. Adherence to do not resuscitate protocol -- transfer of patients. (1) Emergency medical services personnel other than physicians shall comply with the do not resuscitate protocol when presented with, either do not resuscitate identification, an oral do not resuscitate order issued directly by a physician, or a written do not resuscitate order entered on a form prescribed by the department.

(2) An attending physician or a health care facility unwilling or unable to comply with the do not resuscitate protocol shall take all reasonable steps to transfer a person possessing DNR identification to another physician or to a health care facility in which the do not resuscitate protocol will be followed

50-10-104. Effect on insurance -- patient's decision.
(1) Death resulting from the withholding or withdrawal of emergency life-sustaining procedures pursuant to the do not resuscitate protocol and in accordance with this part is not, for any purpose, a suicide or homicide.

(2) The possession of DNR identification pursuant to this part, does not affect in any manner the sale, procurement, or issuance of any policy of life insurance, nor does it modify the terms of an existing policy of life insurance. A policy of life insurance is not legally impaired or invalidated in any manner by the withholding or withdrawal of emergency life-sustaining procedures from an insured person possessing DNR identification, not withstanding any term of the policy to the contrary.

(3) A physician, health care facility, or other health care provider and a health care service plan, insurer issuing disability insurance, self-insured employee welfare benefit plan, or nonprofit hospital plan may not require a person to possess DNR identification as a condition for being insured for or receiving health care.

50-10-105. Rulemaking authority.
(1) Upon the adoption of a do not resuscitate protocol by the board, the department may adopt a standard form of DNR identification to be used statewide.

(2) The department shall adopt rules to administer the provisions of this Part.

50-10-106. Penalties.

(1) A physician who willfully fails to transfer a patient in accordance with 50-10-103 is guilty of a misdemeanor punishable by a fine not to exceed $500 or imprisonment in the county jail for a term not to exceed 1 year, or both.

(2) A person who purposely conceals, cancels, defaces, or obliterates the DNR identification of another without the consent of the possessor or who falsifies or forges a revocation of the DNR identification of another is guilty of a misdemeanor punishable by a fine not to exceed $500 or imprisonment in the county jail or a term not to exceed 1 year, or both.

(3) A person who falsifies or forges the DNR identification of another or purposely conceals or withholds personal knowledge of a revocation of DNR identification with the intent to cause the use, withholding, or withdrawal of life-sustaining procedures is guilty of a misdemeanor punishable by a fine not to exceed $500 or imprisonment in the county jail for a term not to exceed 1 year, or both.

50-10-107. DNR form to be readily available. The department shall ensure that the DNR identification form approved by the department is readily available at no cost or at a nominal charge.

GUARDIAN & CONSERVATORSHIP

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GUARDIANSHIP

INTRODUCTION

If an individual does not take the necessary steps to ensure that his or her decisions regarding health, medical treatment, domicile and business affairs are taken care of in advance by utilizing durable powers of attorney and/or other advance directives, estate planning or living trusts, it may be necessary for a guardian or conservator to be appointed for that individual in the event that person becomes incapacitated and is no longer able to make those decisions for him/herself.

What is a "GUARDIAN"?

Montana law defines a guardian as one who is legally empowered and charged with the duty of taking care of another who, because of age, intellect, or health, is not able to manage his or her own affairs. If a separate conservator is not appointed the court may grant the guardian some or all of the responsibilities of a conservator.

What does a Guardian do?

The guardian's primary responsibility is to assure that the protected person's needs are being met. These needs may include safe and sanitary housing, adequate food, clothing, medical attention, and custodial care.

There are two types of guardianship -- a full guardianship and a limited guardianship. A full guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his minor child. A limited guardian of an incapacitated person has only those powers and duties that are specifically given to him by the district court.

Guardianship for an incapacitated person may be used only as is necessary to promote and protect the well-being of the person. The guardianship must be designed to encourage the development of maximum self-reliance and independence in the person and may be ordered only to the extent that the person's actual mental and physical limitations require it. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by court order or have been, specifically granted to the guardian by the court.

The guardian may not use funds from his ward's estate for room and board which he, his spouse, parent, or child has furnished the ward unless approved by the court The full guardian or limited guardian is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances.

A guardian may not involuntarily commit his ward for mental health treatment or for treatment of a developmental disability or for observation or evaluation, when the ward is unwilling or unable to give informed consent to such commitment, unless the procedures for involuntary commitment are followed according to Montana law as specified in Title 53, Chapters 20 and 21 and S 72-5-322, MCA.

Who may serve as a Guardian?

Any competent person or a suitable institution, association, or nonprofit corporation or any of its members may be appointed guardian of an incapacitated person. Individuals have priority for appointment as guardian in-the following order:

A. The spouse of the incapacitated person;

B. An adult child of the incapacitated person;

C. A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

D. Any relative of the incapacitated person with whom he has resided for more than 6-months prior to the filing of the petition;

E. A relative or friend who has demonstrated a sincere, longstanding interest in the welfare of the incapacitated person;

F. A private association or nonprofit corporation with a guardianship program for incapacitated persons, a member of such private association or nonprofit corporation;

G. A person nominated by the person who is caring for him or paying benefits to him.

The parent of an unmarried incapacitated person may appoint a guardian of the incapacitated person in his or her will or other writing that is signed by the parent and attested by at least two witnesses. The spouse of a married incapacitated person may appoint a guardian of the incapacitated person by will or other writing signed by the spouse and attested by at least two witnesses. The appointment of a guardian by a spouse has priority over an appointment by a parent.

What is the procedure for pursuing a Guardianship?

The incapacitated person or any person interested in his welfare, including the county attorney, may petition the district court for a finding of incapacity and appointment of a guardian. Upon filing the petition the court will set a date for a hearing on the issues of incapacity. The allegedly incapacitated person may have counsel of his own choice or the court may, in the interest of justice appoint an appropriate official or attorney to represent him in the proceeding who will serve as a guardian ad litem (a person who is appointed by the court to represent a ward in legal proceedings).

The person alleged to be incapacitated will be examined by a physician appointed by the court. The physician will submit his report in writing to the court. A visitor, who is appointed by the court, will interview the examining physician. The visitor will also interview the person who filed the petition and the person who is nominated to serve as guardian and will visit the residence of and the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made. The visitor will then submit his report in writing to the court.

The person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon his condition. He is entitled to be

represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and is entitled to a trial by jury. However, the issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or his counsel so requests.

What is a temporary Guardianship?

If an incapacitated person has no guardian and an emergency exists, the court may appoint a temporary guardian without first holding a complete guardianship hearing. If a temporary guardian is appointed in such a case, a complete hearing following full notice to all interested persons must be held within six months to determine if a permanent guardian should be appointed.

When does a Guardianship terminate?

The authority and responsibility of a guardian for an incapacitated person terminate upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon the removal or resignation of the guardian. The incapacitated person may file a written objection to the appointment of the parental or spousal appointment of guardian. The appointment is then terminated. Regardless of the objection, however, the court may then hold a hearing relative to the ward's incapacity and may appoint the parental or spousal nominee or any other suitable person upon a finding of incapacity. If, the ward, or any person interested in the ward's welfare, petitions the court to remove a guardian, the court will hold a hearing and may remove the guardian if it is in the best interests of the ward. The court may also accept the guardian's resignation after holding a hearing when petitioned to do so by the guardian.

CONSERVATORSHIP

What is a "Conservator"?

A conservator is defined as one who is appointed by a district court to *manage the affairs* of a protected person who, because of age, intellect, or health, is incapable of managing his or her own property. When the conservator is appointed, he or she becomes the trustee or person who manages the property of the protected person.

What does a Conservator do?

A conservator is appointed to safeguard the ward's property. Upon being appointed, the conservator must take possession of, protect, and preserve the ward's property. The conservator must invest the ward's property prudently and account for it. The conservator's responsibilities and powers may be limited by the court order.

While gathering the ward's assets, the conservator must make an inventory- of the ward's home or other place of residence. A witness should be used to assist with the inventory. The attorney should be consulted about obtaining a safe deposit box for the ward's valuables. When opening the ward's safe deposit box, the conservator should use a bank officer as a witness of the box's contents. This will offer protection if questions should arise as to the whereabouts of the ward's personal or valued possessions. The conservator must go over everything in the ward's home thoroughly, looking for deeds, insurance policies, wills, and other legal papers representing assets. Also, letters, diaries, personal journals, Bibles, birth, marriage, and death certificates can be helpful in locating relatives and ascertaining pertinent history and background.

Within 90 days after appointment, a complete inventory must be filed by the conservator with the court. This inventory should include any property in the conservator's possession or of which there is knowledge. The attorney should be notified of any legal actions on which the ward has the right to sue. This would include such things as uncollected rents contract rights, or injuries. Every inventory filed must show each item's value and how it was valued. The inventory must also include items listed as valueless. The court may require a conservator to furnish a bond, conditioned upon faithful discharge of all duties of the trust according to law. Unless otherwise directed, the bond shall be in the amount of the aggregate capital value of the property of the estate in the conservator's control plus 1 year's estimated income minus the value of securities deposited under arrangements requiring an order of the court for their removal and the value of any land which the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization.

The conservator must manage the ward's money and pay all the ward's debts and taxes and the expenses of the guardianship. The conservator must pay for the care,

support, and maintenance of the ward and, as authorized by the court, of his or her dependents.

The conservator must open a checking account and a savings account. All bills should be paid by check, including personal items. Conservators should not write checks to himself or herself, other than for items specifically ordered by the court, such as fees. Checks written for cash, which should be done only if absolutely necessary, should be well documented by receipts. Usually a well kept journal is sufficient to prepare the annual accounting.

Annual reports to the court are required. In the annual report, the conservator must give the court a full and correct account of the receipts and disbursements of all the ward's property and a statement of the ward's remaining assets.

None of the ward's property can be sold to a guardian, conservator, anyone named by him or her, an appraiser of the ward's assets, a member of the guardian's or conservator's family. A conservator may not purchase real or personal property for his or her own use. A conservator may not borrow money from the ward or loan the ward's money to a third party. Proceeds of any sales and all excess funds should be properly invested for the ward's benefit.

Procedure for pursuing a Conservatorship

Upon receipt of a petition for appointment of a conservator or other protective order, the court will set a date for hearing. Unless the person to be protected has counsel of his own choice, the court must appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem (a person who is appointed by the court to represent a ward in legal proceedings). If the alleged disability is mental illness or mental deficiency, the court may direct that the person to be protected be examined by a physician or professional person designated by the court. If the alleged disability is physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court. The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

Upon petition and after notice and hearing, the court may appoint a conservator or make other protective order in relation to the estate and affairs of a person if the court

determines that the person is unable to manage his property and affairs effectively for reasons such as: mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and the person has property which will be wasted or dissipated unless proper management is provided or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds.

Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order requiring an accounting for the administration of the protected person's trust or for an order removing the conservator and appointing a temporary or new conservator, or may petition the court for other appropriate relief.

Who may serve as a Conservator?

The court may appoint an individual or a corporation with general power to serve as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

A. A conservator, guardian of property, or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

B. An individual or corporation nominated by the protected person if he is 14 or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

C. The spouse of the protected person;

D. An adult child of the protected person;

E. A parent of the protected person or a person nominated by the will of a deceased parent;

F. Any relative of the protected person with whom he has resided for more than 6 months prior to the filing of the petition;

G. A person nominated by the person who is caring for him or paying benefits to him;

H. A conservator corporation organized under Title 35, chapter 2;

I. The public administrator.

When does a conservatorship terminate?

The court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. In the event of the conservator's death, resignation, or removal, the court may appoint another conservator. Upon the conservator's discharge, all remaining assets must be returned to the ward or the newly appointed conservator. The conservator then obtains a receipt for all assets returned and files the receipt with the court. When a ward dies, the funeral home and the next of kin must be notified.

The power of the conservator to act ceases upon the ward's death. The conservator must not, under any circumstances, sign for cremation, select a casket, or make other burial arrangements for the ward. The conservator should assist in providing vital information to the funeral home and notify the next of kin. The conservator must immediately notify the guardianship attorney and all other interested parties of the death.

COMPILED BY

Department of Public Health and Human Services, Office on Aging

ADDITIONAL RESOURCES

Office on Aging/SLTC Div./DPHHS	**1-800-332-2272**
Governor's Citizen's Advocate Office	**1-800-332-2272**
Montana Attorney General's office	**406-444-2026**
Montana State Bar Association	**406-442-7660**
Lawyer Referral Service	**406-449-6577**
Pro Bono Program	**406-252-6351**
Montana Legal Services Association	**406-442-9830**
Montana Advocacy Program	**1-800-245-4743**
Montana Dept. of Revenue	
Inheritance Tax Section	**406-444-3356**
Montana Dept. of Commerce	
Consumer Affairs Office	**406-444-3494**
Montana Dept of Public Health and Human Services	
Medicaid Eligibility Policy	**406-444-5900**
Medicaid Eligibility (case specific)	**Local county welfare office**
Lien and Estate Recovery Policy	**406-444-4162**
Lien & Estate Recovery Program (specific cases)	**1-888-378-2836**
Marsha Geotting, CRP, C.H.E., MSU Extension Services	**406-994-5695**